Government of Malaysia v Maksima Amanjaya Development Sdn Bhd (formerly known as Maksima Amanjaya Terminal Sdn Bhd) & Anor

HIGH COURT (IPOH) — CIVIL SUIT NO AA-21NCVC-8–02 OF 2021
SU TIANG JOO JC
22 NOVEMBER 2021

Civil Procedure — Stay of proceedings — Application for — Plaintiff filed action against defendants for additional income tax assessed in notice of additional assessment — Defendants filed application for stay of proceedings pending final determination of appeal to Special Commissioners of Income Tax ('SCIT') — Whether there were special circumstances — Whether appeal to SCIT would be rendered nugatory if stay not allowed — Whether court should consider merit of appeal in stay of proceeding application — Income Tax Act 1967 ss 103 & 106

The plaintiff claimed against the defendants for additional income tax assessed in a notice of additional assessment dated 23 September 2020 ('NAA'). The defendants opposed the claim and filed the present application ('encl 7') to stay proceedings in the court pending the full and final determination of an appeal by the first defendant to the Special Commissioners of Income Tax ('the SCIT') against the NAA. The first defendant argued that it had merits in the said appeal and that the same would be rendered nugatory if encl 7 was not allowed. The defendants further argued that if encl 7 was allowed it would save much time and costs in this action. The issue arose was whether by not making an order for stay would it make the appeal to the SCIT nugatory. The learned revenue counsel raised a preliminary objection that based on ss 103 and 106 of the Income Tax Act 1967 ('the ITA'), encl 7 should be dismissed as the defendants failed to state under what provisions of the law that they sought to apply for the stay.

Held, dismissing encl 7 with costs:

(1) A perusal of encl 7 showed that the defendants were moving the court under the court's inherent jurisdiction. In the circumstances, the court dismissed the preliminary objection and proceeded with the merits of encl 7 (see paras 20 & 22).

(2) The grounds relied upon by the defendants did not amount to special circumstances. In relation to the argument that there was merit in the appeal, the court was guided by the oft-quoted authority of *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257, where Augustine Paul JCA (sitting as FCJ) held that the merits

of a party's case in a stay application was not a relevant matter for consideration. Further, contrary to the assertion by the defendants, the recovery action in this set of civil proceedings would not render nugatory the first defendant's appeal to the SCIT and this was expressly provided by the statutory provisions of ss 103(1), (1A), (2) and 106(3) of the ITA (see paras 29–30 & 32).

(3) The court had dismissed encl 7 with costs. However, in view of the authorities cited by the defendants including *Kerajaan Malaysia lwn Berjaya Times Square Sdn Bhd* [2018] MLJU 616, the court had allowed an interim stay pending the defendants renewing their application in the Court of Appeal for a stay of proceedings pending their appeal against this court's decision to the Court of Appeal (see para 35).

[Bahasa Malaysia summary

Plaintif memfailkan tuntutan terhadap defendan-defendan untuk cukai pendapatan tambahan yang dinilai dalam notis taksiran tambahan bertarikh 23 September 2020 ('NTT'). Defendan-defendan mencabar tuntutan tersebut dan memfailkan permohonan semasa ('lampiran 7') untuk menggantung prosiding di mahkamah sementara menunggu penentuan penuh dan muktamad rayuan oleh defendan pertama kepada Pesuruhjaya Khas Cukai Pendapatan ('PKCP') terhadap NTT tersebut. Defendan pertama berhujah bahawa terdapat merit dalam rayuan tersebut dan rayuan tersebut akan menjadi sia-sia jika lampiran 7 tidak dibenarkan. Defendan seterusnya berhujah bahawa jika lampiran 7 dibenarkan ia akan menjimatkan banyak masa dan kos dalam tindakan ini. Isu yang timbul ialah sama ada dengan tidak membuat perintah penggantungan, ia akan menjadikan rayuan kepada SCIT menjadi sia-sia. Peguam hasil yang terpelajar membangkitkan bantahan awal bahawa berdasarkan ss 103 dan 106 Akta Cukai Pendapatan 1967 ('ACP'), lampiran 7 harus ditolak kerana defendan-defendan gagal menyatakan di bawah peruntukan undang-undang yang mana mereka memohon untuk penggantungan tersebut.

Diputuskan, menolak lampiran 7 dengan kos:

(1) Semakan ke atas lampiran 7 menunjukkan bahawa defendan-defendan membuat permohonan di mahkamah ini di bawah bidang kuasa sedia ada mahkamah. Dalam keadaan tersebut, mahkamah menolak bantahan awal tersebut dan meneruskan dengan merit lampiran 7 (lihat perenggan 20 & 22).

(2) Alasan-alasan yang disandarkan oleh defendan-defendan tidak terjumlah kepada keadaan khusus. Berhubung dengan hujah bahawa terdapat merit dalam rayuan tersebut, mahkamah mengikut autoriti kes yang sering disebut iaitu *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257, di mana Augustine Paul HMR

(bersidang sebagai HMP) berpendapat bahawa merit kes sesuatu pihak dalam permohonan penggantungan bukanlah perkara yang relevan untuk dipertimbangkan. Selanjutnya, bertentangan dengan penegasan oleh defendan-defendan, tindakan menuntut bayaran dalam set prosiding sivil ini tidak akan menyebabkan rayuan defendan pertama kepada SCIT sia-sia dan ini diperuntukkan secara nyata oleh peruntukan berkanun ss 103(1), (1A), (2) dan 106(3) ACP (lihat perenggan 29–30 & 32).

(3) Mahkamah telah menolak lampiran 7 dengan kos. Bagaimanapun, mengambil kira autoriti yang dipetik oleh defendan termasuk *Kerajaan Malaysia lwn Berjaya Times Square Sdn Bhd* [2018] MLJU 616, mahkamah telah membenarkan penggantungan interim sementara menunggu defendan-defendan memperbaharui permohonan mereka di Mahkamah Rayuan untuk penggantungan prosiding sementara menunggu rayuan mereka terhadap keputusan mahkamah ini ke Mahkamah Rayuan (lihat perenggan 35).]

Cases referred to

Chong Woo Yit v Government of Malaysia [1989] 1 MLJ 473; [1989] 1 CLJ Rep 9; [1989] 2 CLJ 87, SC (refd)

Director-General of Inland Revenue v Hypergrowth Sdn Bhd [2008] 1 MLJ 417; [2008] 4 CLJ 250, HC (refd)

Government of Malaysia v Datuk Hj Kadir Mohamad Mastan and another application [1993] 3 MLJ 514; [1993] 4 CLJ 98, HC (refd)

Government of Malaysia v Margaret Au Nyat Fa [2007] MLJU 608; [2008] 3 CLJ 424, HC (refd)

Kerajaan Malaysia v AEON Credit Service (M) Berhad (Civil Suit No BA-21NCVC-34–06 of 2019) (unreported), HC (refd)

Kerajaan Malaysia lwn Berjaya Times Square Sdn Bhd [2018] MLJU 616; [2018] 1 LNS 720, HC (refd)

Kerajaan Malaysia v Ekran Bhd [2006] 2 MLJ 749; [2006] 5 CLJ 92; [2010] MSTC 30-008, HC (refd)

Kerajaan Malaysia v Jasanusa Sdn Bhd [1995] 2 MLJ 105; [1995] 2 CLJ 701, SC (refd)

Kerajaan Malaysia v Raja a/l K Veerasamy [2014] MSTC 30-074, HC (refd)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257; [2003] 4 CLJ 1, FC (folld)

National Land Finance Co-operative Society Ltd v Director General of Inland Revenue [1994] 1 MLJ 99; [1993] 4 CLJ 339, SC (refd)

Sarawak Securities Sdn Bhd v Gerard Ding Sing Dac & Ors [2000] MLJU 403; [2000] 7 CLJ 378, HC (refd)

Sun Man Tobacco Co Ltd v Government of Malaysia [1973] 2 MLJ 163; [1973] 1 LNS 144, FC (refd)

Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram [2001]

A MLJU 390; [2002] 1 CLJ 609, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 44
Income Tax Act 1967 ss 103(1), (1A), (2), 106, 106(1), (2), (3)

B

Norhidayah bt Mohamad Anas (Inland Revenue Board Malaysia) for the plaintiff.
Saravana Kumar (Elani Mazlan with him) (Rosli Dahlan Saravana Partnership) for the defendants.

C **Su Tiang Joo JC:**

INTRODUCTION

[1] The plaintiff claims against the defendants for additional income tax
D assessed in a notice of additional assessment dated 23 September 2020 ('NAA'). The defendants opposed the claim and sought to stay proceedings in this court ('court') pending the full and final determination of an appeal by the first defendant to the Special Commissioners of Income Tax ('SCIT') against the NAA.

E

APPLICATIONS BEFORE THE COURT

[2] On 6 October 2021, three applications were before the court for hearing: (i) the defendants' application for an extension of time to file their
F defence (encl 5); (ii) the defendants' application for a stay of all proceedings pending the disposal of the first defendant's appeal against the NAA to the SCIT (encl 7); and (iii) an application by the plaintiff for summary judgment to be entered against the defendants (encl 11).

G **[3]** By agreement of both parties, the application for stay (encl 7) was to be heard first followed by the other two applications (encls 5 and 11).

STAY APPLICATION (ENCL 7)

H **[4]** After hearing the application for stay (encl 7), I dismissed it with costs. Learned counsel for the defendants then said that he has instructions to appeal against this decision and applied for an interim stay of proceedings pending his appeal. This was opposed by the learned revenue counsel.

I INTERIM STAY

[5] To allow the defendants to exercise their right to renew an application for stay in the Court of Appeal pending an appeal pursuant to s 44 of the Courts of Judicature Act 1964 (Act 91) ('the CJA'), I had allowed an interim

stay of all proceedings pending the disposal of the defendants' prospective application in the Court of Appeal pending their appeal against this court's decision to dismiss their application (encl 7) to stay all proceedings in this court.

[6] For purposes of managing this matter, a case management was fixed on 10 November 2021 for parties to update this court on the status of the defendants' prospective appeal to the Court of Appeal and their application for stay in the Court of Appeal.

[7] To aid the reading of this judgment, the provisions of s 44 of the CJA are reproduced hereunder:

> (1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.
>
> (2) Every application under subsection (1) shall be deemed to be a proceeding in the Court of Appeal.
>
> (3) Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the Court.

APPEAL TO THE COURT OF APPEAL

[8] On 8 October 2021 the defendants filed a notice of appeal (encl 37) against the decision of 6 October 2020 dismissing their stay application.

PLAINTIFF'S CLAIM

[9] The NAA was raised by the plaintiff consequent to the Director General of Inland Revenue's ('DGIR') decision to subject the gains arising from the first defendant's disposal of shares in Perak Transit Bhd to income tax pursuant to the Income Tax Act 1967 (Act 53) ('the ITA').

[10] The second defendant was at the material time the director of the first defendant holding 70% shares in the company.

[11] For the 2017 year of assessment, the first defendant was additionally assessed for income tax of RM1,801,120.13. There was a balance sum of RM1,801,096.72 due after taking into account payment of RM23.41.

A However, as the first defendant failed to effect payment of the tax due within 30 days of the service of the NAA, an additional 10% penalty amounting to RM180,109.67 was levied.

B **[12]** The first defendant paid a sum of RM131,299.23 bringing the total exigible to be RM1,849,907.16. As it was not paid, hence this action to recover the same.

PREMISE FOR STAY APPLICATION (ENCL 7)

C **[13]** The first defendant challenged the validity of the NAA and had by the requisite Form Q prescribed by the ITA dated 14 October 2020 filed an appeal to the SCIT. The first defendant asserted that it has merits in the said appeal and that the same will be rendered nugatory if the stay application (encl 7) is
D not allowed.

[14] The defendants further asserted that if the stay application (encl 7) is allowed it will save much time and costs in this action.

E **[15]** In support of the stay application, the defendants filed an affidavit in support affirmed on 18 March 2021 (encl 8), and an affidavit in reply (encl 17), which was to reply to the plaintiff's affidavit in reply affirmed by Siti Sara bt (sic) Abu Bakar on 13 April 2021 (encl 12 and repeated in encl 13).

F **[16]** Without meaning any discourtesy to the defendants, the averments in the affidavits filed to support the stay application can be summarised as follows:

(a) the first defendant is in the process of settling the claim by way of a dispute resolution proceeding;

G (b) the first defendant ought to be allowed to pursue its appeal to the SCIT to its final conclusion and in the meanwhile, it was not mandatory for the plaintiff to proceed with this (debt recovery) civil action;

(c) the first defendant has a meritorious appeal against the NAA;

H (d) unless stayed, the action will have an adverse impact on the first defendant's reputation with an accompanying prospective social cost (such as loss of employment to its employees in the event the first defendant becomes insolvent) which would be impossible to restore with severe implications upon its directors such as the second defendant;

I (e) the economic crisis brought about by the COVID-19 pandemic has heavily affected the first defendant and it would be very difficult if not impossible for the defendants to raise such a substantial amount of money; and

(f) the first defendant has been diligent in prosecuting the appeal to the SCIT and in filing the stay application.

PRELIMINARY OBJECTION

[17] By way of preliminary objection, the learned revenue counsel drew the court's attention to sub-s 103(1), (1A) and (2) of the ITA. In summary, sub-s 103(1) stipulates the principle that tax payable under an assessment or additional assessment is due and payable whether or not that person appeals against the assessment. For ease of reference, sub-s 103(1)–(2) are reproduced below:

> (1) Except as provided in subsection (2), *tax payable under an assessment for a year of assessment shall be due and payable on the due date whether or not that person appeals against the assessment*.
>
> (1A) Where an assessment or additional assessment has been made under section 91A, *the tax or additional tax payable under the assessment shall be due and payable on the day the amended return is furnished whether or not that person appeals against the assessment or additional assessment*.
>
> Provided that where the amended return is furnished within a period of sixty days after the due date and the amount of tax due and payable has not been paid within the period of sixty days from the due date, so much of the tax as is unpaid upon the expiration of that period shall without any further notice being served be further increased by a sum equal to five per cent of the tax so unpaid, and that sum shall be recoverable as if it were tax due and payable under this Act.
>
> (2) Where an assessment is made under subsection 90(3), section 91, 92 or 96A, or where an assessment is increased under subsection 101(2), *the tax payable under the assessment or increased assessment shall, on the service of the notice of assessment or composite assessment or increased assessment, as the case may be, be due and payable on the person assessed at the place specified in that notice whether or not that person appeals against the assessment or increased assessment*. (Emphasis added.)

[18] Further, s 106 of the ITA, inter alia, provides that in any proceedings for recovery of tax, the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased. For ease of reference, sub-s 106(1), (2) and (3) are reproduced below:

> (1) Tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government.
>
> (2) The Director General and all authorized officers shall be deemed to be public officers authorized by the Minister under subsection 25(1) of the Government Proceedings Ordinance 1956 [now the Government Proceedings Act 1956], in respect of all proceedings under this section.
>
> (3) *In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under*

A *appeal or incorrectly increased* under subsection 103(3), (5) or (7). (Emphasis added.)

B **[19]** In view of the aforesaid statutory provisions, the learned revenue counsel asserts that the stay application should be dismissed as the defendants failed to state under what provisions of the law that they seek to apply for the stay. Reliance was placed upon the authorities of *Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram* [2001] MLJU 390; [2002] 1 CLJ 609 (HC) and *Sarawak Securities Sdn Bhd v Gerard Ding Sing Dac & Ors* [2000] MLJU 403; [2000] 7 CLJ 378 (HC).

C

[20] However, a perusal of the stay application (encl 7) shows that the defendants are moving the court under the court's inherent jurisdiction.

D **[21]** The Supreme Court in both *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473; [1989] 1 CLJ Rep 9; [1989] 2 CLJ 87 and *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105; [1995] 2 CLJ 701 have held that the provisions of sub-ss 103(1) and 106(1) of the ITA do not bar a court from exercising in appropriate circumstances its inherent powers to

E grant a stay even in a tax case.

[22] In the circumstances, this court dismissed the preliminary objection and proceeded with the merits of the stay application (encl 7).

F MERITS OF STAY APPLICATION

[23] The defendants strongly relied on the High Court case of *Kerajaan Malaysia lwn Berjaya Times Square Sdn Bhd* [2018] MLJU 616; [2018] 1 LNS

G 720, where Her Ladyship, Nor Bee Ariffin J (now JCA) allowed a stay of proceedings where:

(a) there was a pending appeal to the SCIT;

(b) it could not be discounted that a settlement may be arrived at between

H the DGIR and the taxpayer and in such an event, the assessment would be discharged; and

(c) the merits of the appeal is one of the factors to be considered.

I **[24]** The learned counsel for the defendants added that upon appeal, the decision of Her Ladyship in *Kerajaan Malaysia lwn Berjaya Times Square Sdn Bhd* [2018] MLJU 616; [2018] 1 LNS 720 was affirmed by the Court of Appeal.

[25] To the credit of learned counsel for the defendants, several other authorities were marshalled to show that a stay of proceedings had been granted in the following recovery of tax cases:

(a) *Kerajaan Malaysia v Ekran Bhd* [2006] 2 MLJ 749; [2006] 5 CLJ 92; [2010] MSTC 30-008 (HC);

(b) *Government of Malaysia v Margaret Au Nyat Fa* [2007] MLJU 608; [2008] 3 CLJ 424 (HC);

(c) *Kerajaan Malaysia v Raja a/l K Veerasamy* [2014] MSTC 30-074 (HC); and

(d) *Kerajaan Malaysia v AEON Credit Service (M) Berhad* (Civil Suit No BA-21NCVC-34–06 of 2019) (unreported) (HC).

[26] Besides that, the defendants had filed an appeal on 9 October 2020, and learned counsel asserted that the DGIR had presented a proposal for settlement that was being considered by the taxpayer and the returns on the disposal of the shares it held should have been treated as a return in capital and not income with reference made to the High Court case of *Director-General of Inland Revenue v Hypergrowth Sdn Bhd* [2008] 1 MLJ 417; [2008] 4 CLJ 250. It was found in the said case of *Director General of Inland Revenue v Hypergrowth Sdn Bhd* that the dominant purpose for the purchase of shares was established as a matter of fact to be for investment purposes and the gains deemed to be capital receipt. The case of *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105; [1995] 2 CLJ 701 was also cited for the principle that the need of the taxpayer to be protected against arbitrary and incorrect assessments ought to be taken into account.

[27] It was asserted by the defendants that the plaintiff has failed to pay out RM3.807 billion in tax refunds for Year of Assessment 2017. The point being made was that if the defendants were to pay the tax under the NAA, there is no guarantee that the plaintiff would receive a full refund within a stipulated time. However, what this stipulated time is or ought to be, was not stated by the defendants.

[28] The defendants further asserted it has a history of being a law-abiding and responsible taxpayer with no records of being subjected to any civil action for any past failure to pay any income tax and have given full co-operation when the DGIR conducted a tax audit. There was no delay in making the application for stay and the defendants concluded their submissions that the SCIT appeal would be rendered nugatory if the stay is refused.

[29] With respect to learned counsel for the defendants, I agree with the learned revenue counsel that the grounds relied upon by the defendants do not

amount to special circumstances. It cannot be gainsaid that it behoves every citizen to pay his just dues in taxes. There is a specific statutory mechanism to challenge whether it is just. In this case, it is by way of an appeal to the SCIT against any assessment that is disputed. The inconveniences and anxiety that the defendants have expressed are but the natural consequences of being subjected to litigation. If in the opinion of the defendants that the bringing of such a suit is an abuse of process of court or amounts to tortious conduct, then the defendants are just as entitled to pursue legal action.

[30] In my view, the determining factor in considering the stay application (encl 7) is whether by not making an order for stay would it make the appeal (to the SCIT) nugatory, see *Government of Malaysia v Datuk Hj Kadir Mohamad Mastan and another application* [1993] 3 MLJ 514; [1993] 4 CLJ 98 (HC). I find that contrary to the assertion by learned counsel for the defendants, the recovery action in this set of civil proceedings would not render nugatory the first defendant's appeal to the SCIT and this is expressly provided by the statutory provisions of sub-ss 103(1), (1A), (2) and 106(3) of the ITA.

[31] I am conscious that in this application for stay (encl 7), the merits of the suit by the plaintiff should not be decided especially seeing that there is an application (encl 11) for summary judgment to be entered.

[32] Indeed, as for there being merits in the appeal (to the SCIT), this court is guided by the oft-quoted authority of *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1 (FC), where Augustine Paul JCA (sitting as FCJ) held that the merits of a party's case in a stay application is not a relevant matter for consideration.

[33] However, as the defendants have raised the issue that the first defendant having merits in its appeal is a ground that ought to be considered in this stay application (encl 7) as was decided in *Kerajaan Malaysia lwn Berjaya Times Square Sdn Bhd* [2018] MLJU 616; [2018] 1 LNS 720, this court without making any ruling which may be construed as a pre-judgment on the application for summary judgment (encl 11) and for the avoidance of any doubt, I repeat that what I am going to say next is without prejudice to the said application (for summary judgment) (encl 11), that to my mind, the jurisprudence underlying recovery of tax cases is settled in that upon service of a notice of assessment, an assessment requires payment, irrespective of there being an appeal (to the SCIT), see *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99; [1993] 4 CLJ 339 (SC), *Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163; [1973] 1 LNS 144 (FC) and *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473; [1989] 1 CLJ Rep 9; [1989] 2 CLJ 87 (SC).

[34] In putting up these grounds, I gratefully bear in mind the advice of the Rt Hon Lord Justice Haddon-Cave of the Court of Appeal reported in the *Graya News Number 37* (Autumn 2021) and reproduced hereunder:

> ... be astute to exercise the self-denying ordinance of only dealing with the key points in issue and not be tempted to write exegesis on points which weren't. Ideally, excessive citation of authority (in particular cutting and pasting large chunk of cases) should be avoided.

CONCLUSION

[35] The upshot of this case is that the stay application (encl 7) is dismissed with costs. However, in view of the authorities cited by the defendants including *Kerajaan Malaysia lwn Berjaya Times Square Sdn Bhd* [2018] MLJU 616; [2018] 1 LNS 720, I had allowed an interim stay pending the defendants renewing their application in the Court of Appeal for a stay of proceedings pending their appeal against this decision I had made on 6 October 2021 to the Court of Appeal. By agreement, the costs of the dismissal of the stay application (encl 7) is to be costs in the cause of the other two applications (encls 5 and 11).

Enclosure 7 dismissed with costs.

Reported by Dzulqarnain Ab Fatar